IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 6, 2007 Session

BARBARA E. RUNIONS v. MAURY COUNTY, TENNESSEE

Appeal from the Circuit Court for Maury County
No. 10735 Stella L. Hargrove, Judge

No. M2006-00067-COA-R3-CV - Filed on April 9, 2007

This case concerns a slip-and-fall on county property in which the injured party asserted that a slope in the floor of the office caused her fall. The county argued that the injured fell as a result of health problems, and that she never reached the office, but fell in the hallway outside the office. Following the trial on the matter, the injured filed a Motion to Reopen Proof, maintaining that an internal accident report had been altered by the county in an attempt to bolster its case. The trial court denied the injured's Motion to Reopen Proof, and found in favor of the county. The injured appeals the trial court's denial of its motion, the trial court's findings of fact and conclusions of law, and the trial court's refusal to allow Appellant to introduce Federal Safety Requirements as a notice of a dangerous condition. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Phillip L. Davidson, Nashville, Tennessee, for the appellant, Barbara E. Runions.

Jeffrey M. Beemer, Jennifer L. Gremillion, Nashville, Tennessee, for the appellee, Maury County, Tennessee.

OPINION

I. FACTUAL BACKGROUND

On February 17, 2004, Barbara Runions ("Appellant") went to the Maury County ("Appellee") Trustee's office to pay her property taxes. She fell, sustaining injuries. At the time of her fall, Appellant was in her early sixties and suffered from several health problems, including diabetes, osteoporosis, and peripheral neuropathy. Her health problems resulted in weakness in her legs, numbness in her feet, and an open ulcer on her left heel. Also at the time of her fall, Appellant suffered from drop foot in her right leg, which caused her toes to point downward as she walked.

The exact logistics regarding the fall are in dispute. The parties agree that there is a 4% downward slope inside the office door, while the area outside the door is flat. However, Appellant alleges that the slope begins immediately inside the door, while Appellee alleges that the slope begins approximately five inches beyond the threshold of the door. Appellant alleges that she opened the outward-opening door to the Trustee's office, took one step in, and then fell. Appellant's grandson, who was present at the time of her fall, testified that he had to lean over her to get help from someone in the office because she was lying in the way of the door and it could not be opened all the way. Appellee alleges that Appellant never opened the door, and that she fell outside the office. A county employee testified that after Appellant fell, there was plenty of room to pass through the door. In summary, Appellant alleges that she fell after opening the office door, stepping inside, and losing her footing on the slope. Appellee alleges that Appellant never even reached the door, but fell in the hallway outside the office after tripping over her own feet, citing her physical ailments as the cause. It is undisputed that after her fall, Appellant was lying in the hallway completely outside the trustee's office; the parties dispute Appellant's distance from the door.

Appellant filed suit on March 10, 2004. The case was tried on October 12, 2005. Appellant filed a Motion to Reopen Proof on November 4, 2005, alleging that an incident report prepared at the scene of Appellant's fall had been altered prior to the trial, thereby proving inconsistency of witness testimony at trial, and negating the factual basis for Appellee's expert witness. A hearing regarding the motion was held on November 30, 2005 and on December 7, 2005, the trial court denied Appellant's Motion to Reopen Proof.

On December 28, 2005, the trial court issued an Order adopting Appellee's Proposed Findings of Fact and Conclusions of Law. The Order states as follows:

> This cause was heard on the 12th day of October, 2005, upon Complaint of [Appellant], the Response of [Appellee], testimony of witnesses in open Court, statements and arguments of counsel, briefs and proposed findings submitted by counsel, and the record; from all of which the Court finds that [Appellant] has not carried her burden of proof, and that her Complaint should be dismissed.
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> In this one-day trial involving a slip and fall, the Court heard testimony from [Appellant], from County Trustee Steve Konz, Erin Jaggers, Administrative Assistant to the County Mayor, three of [Appellant]'s children, and [Appellant]'s expert witness, Harvey Hall, a Safety Engineer. The [Appellee] called Janice Pruitt, an employee of the County Trustee, and Chad Becker, Director of Safety and Security for Scripps Networks. The Court also viewed the location of the fall.
>
> [Appellant] complains to the Court about the credibility of Erin Jaggers. Specifically, [Appellant] questions the investigation Report (Trial Exhibit No. 15) prepared by Ms. Jaggers. Of all the witnesses who testified before it, the Court has the most difficulty with the credibility of [Appellant].
>
> Of the two engineer experts, the Court gives greater weight to the testimony of Chad Becker.

> Upon opening the door to the Trustee's Office, there is a threshold or flat tile surface measuring about five (5) inches, and then a slight downward slope. Just outside the entrance is a rail to the left side of the double doors. The left door is locked in place, so that only the right one is used for entrance and exit. [Appellant]'s expert engineer, Mr. Hall, testified that the downward slope contributed to [Appellant]'s fall. However, it is never clear to the Court whether [Appellant] even stepped into the office. Indeed, it is not clear whether [Appellant] even reached the door to the office prior to her fall. It is clear that [Appellant] landed outside the Trustee's office in the hallway, with her head leaning against the railing and her body lying parallel to the door. [Appellant] was lying completely outside the office and far enough away from the door that the door could be opened in front of her.
>
> Janice Pruitt testified that [Appellant] was lying some two (2) feet from the door, far enough from the door that Ms. Pruitt was able to squat between [Appellant] and the door. It is undisputed that the hallway, consisting of a flat tile surface, was clear of any obstacles or debris to cause [Appellant]'s fall.
>
> The Court finds that [Appellant] has failed to prove that a dangerous condition at the Trustee's Office was the cause in fact or proximate cause of her fall. [Appellant]'s first statement that "she tripped on her own feet" is consistent with her numerous and severe medical problems related to diabetes, including drop foot and weakness in her legs, or peripheral neuropathy. [Appellant] agreed that she had an open ulcer on the bottom of her heel at the time of the fall. She testified that while she was experiencing no pain from the ulcer, the nerves in her feet were deadened from diabetes.
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> The Court hereby adopts the Proposed Findings of Fact and Conclusions of Law submitted by [Appellee] in their entirety, and dismisses this case.

Appellant presents the following issues on appeal: (1) whether the trial court abused its discretion by denying Appellant's Motion to Reopen Proof; (2) whether the evidence at trial preponderated against the trial court's findings of fact and conclusions of law; and (3) whether the trial court erred by denying Appellant the right to introduce Federal Safety Requirements as a notice of a dangerous condition.

II. STANDARD OF REVIEW

The standard of review in this case was stated in a 2005 Court of Appeals case:

> The trial court's findings of fact are reviewed *de novo* with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). "Our search for the preponderance of the evidence is tempered by the principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such credibility determinations are entitled to great weight on appeal." *Rice v. Rice*, 983 S.W.2d 680, 682 (Tenn.Ct.App.1999) (citing *Massengale v. Massengale*, 915 S.W.2d 818, 819 (Tenn.Ct.App.1995); *Bowman v. Bowman*, 836 S.W.2d 563, 567 (Tenn.Ct.App.1991)). Questions of law are not entitled to Tenn. R.

> App. P. 13(d)'s presumption of correctness on appeal. We will review the legal issues *de novo* and reach our own independent conclusions regarding them. *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001); *King v. Pope*, 91 S.W.3d 314, 318 (Tenn.2002).

Cantrell v. Cantrell, 2005 Tenn. App. LEXIS 175, at *5 (Tenn.Ct.App. Mar. 8, 2005).

III. ANALYSIS

A. Motion to Reopen Proof

At the time of Appellant's fall, Erin Jaggers ("Jaggers") was the administrative assistant in the county mayor's office. As one of her responsibilities, Jaggers was to take a report of any falls in the courthouse or surrounding buildings. She took such a report following Appellant's fall. Under the "DESCRIPTION OF ACCIDENT" section of the report, Jaggers wrote:

> The lady was opening the door to the trustee's office when she fell. She stated she just tripped on her foot. She stated that her left leg was hurt real bad. She heard it pop. The top portion (femor) [sic] hurt along with her knee. No other injuries were reported. There was no water or obstacle present and also no wetness on her feet that might cause her to fall. Janice Pruitt from the Trustee's office helped the woman and she stated she saw her coming in, and then she just fell before she opened the door.

Under the "WHAT HAS BEEN OR WILL BE DONE TO PREVENT SIMILAR INJURIES" section of the report, Jaggers wrote "just an accident."

Appellant argues that the incident report was altered, and that Jaggers added the final clause of the accident description stating "before she opened the door" in order to bolster Appellee's position that Appellant never entered the office. After the trial, on October 26, 2005, Appellant hired Forensic Document Examiner Thomas W. Vastrick ("Vastrick") to examine Jaggers' incident report for evidence of alteration. Following is an excerpt from his Forensic Document Examination Report:

> **Findings**
>
> The entries "*before she opened the door. Erin Jaggers Co. Exec. Office*" on the back of Exhibit 1 have been added and are not contemporaneous to the other entries in this section of Exhibit 1.
>
> **Reasons and Basis**
>
> The entries "*before she opened the door. Erin Jaggers Co. Exec. Office*" on the back of Exhibit 1 are written in a different ink than that of the remaining entries in this section. Infrared luminescence differentiation provided definitive evidence of the different inks.

> A period, in ink consistent with that of the aforementioned remaining Description of Accident entries, was noted at the bottom left portion of the lower case "b" of the word "before" on line 8 of the entries on the back of Exhibit Q-1.

Based upon this report, Appellant maintained that Jaggers and Pruitt offered conflicting testimony, calling their credibility into question and negating their expert witness's testimony, and therefore filed a Motion to Reopen Proof.

Appellee does not believe that Appellant should be allowed to reopen proof, maintaining that the only reason for Appellant's request is to allow Vastrick to testify regarding Jaggers' incident report. Appellee alleges that Appellant possessed a copy of the incident report long before the trial took place on October 12, 2005, even questioning witnesses at the trial about possible alterations, but delayed in consulting Vastrick until after the trial. According to Appellee, Appellant did not act in a timely manner, and a motion to reopen proof is improper to remedy such failure to timely act.

"Permitting additional proof, after a party has announced that proof is closed, is within the discretion of the trial court, and unless it appears that its action in that regard has permitted injustice, its exercise of discretion will not be disturbed on appeal." *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 149 (Tenn.1991). In *Higgins v. Steide*, 335 S.W.2d 533, 551 (Tenn.Ct.App.1959), this Court ruled that the trial court erred in allowing the proof to be reopened (specifically, the trial judge recessed the trial and allowed counsel to fly to another city and locate a witness when counsel had ample time to do so before trial). This Court explained that counsel arguing in favor of reopening the proof should have had the diligence to locate and present the witness at trial, basing its decision on the following rationale:

> To approve such procedure will establish, in our opinion, such a precedent that could lead to undue prolongation of the trial of cases to the congestion of court dockets and embarrassment of litigants and trial courts.
>
> We doubt that it is within the exercise of sound discretion to continue a case for the reopening of proof, under the circumstances shown by this record, and permit counsel for either party to fly to some distant city to locate witnesses that he had had an opportunity to have located long before.

Higgins, 335 S.W.2d at 540. *See also Robinson v. Lecorps*, 83 S.W.3d 718, 725 (Tenn.2002). Appellant should not be permitted to reopen proof when there was ample time to gather such proof before the trial. Allowing such activity would only further prolong the trial, and to no end. As Appellee stated at oral argument, even if the incident report had been altered, the facts of the case do not change - according to witness testimony, Appellant's location after the fall is the same. We refuse to find that the trial court abused its discretion based upon so tenuous an argument.

B. Trial Court's Findings of Fact and Conclusions of Law

Appellant alleges that the trial court's findings of fact and conclusions of law are not supported by the preponderance of the evidence. More specifically, Appellant alleges that the trial court was incorrect to side with Appellee in the swearing contest that took place at the lower court level. Basically, this case came down to which side's witnesses were the most believable. The trial court seemed to base its ruling on the credibility of the witnesses. In its Order, the trial court specifically stated that Appellant lacked credibility, and that Appellee's expert was the most credible expert witness.

At trial, Appellant testified as to her version of the facts regarding her fall. An excerpt from her testimony appears below:

> Q: Miss Runions, tell the Court what – first of all, which one of – it looks like there's double doors there. Which door did you attempt to go into? Was it the door on the right or the door on the left?
> A: The door on the right.
> Q: Tell the Court, if you would – and just take your time - what happened next.
> A: Well, I approached the door and I started opening it. I got it a little bit opened. And I started to take a step in, and then I just – I just fell. The door closed and, I mean, I fell at that time.
> Q: Was the door difficult for you to open?
> A: Yes. Very difficult. It is heavy.
> Q: And about how far do you estimate you had it open before it started closing?
> A: Maybe halfway. Maybe a little bit more. But not –
> Q: Did the door – when it started closing, what happened to you? What did it feel like when it started closing on you?
> A: Well, it felt like it was – I mean, it came into me and then I started falling then. It just, you know – I fell to the floor back and I – when I was falling, I could feel that my leg was breaking.

Janice Pruitt, however, was in the office at the time of Appellant's fall, and remembers the event much differently, testifying that Appellant never even reached, and certainly did not enter, the door:

> A: When I went to set my purse down, I looked away just for a moment, and when I looked back up I seen Miss Runions laying in front of our door, on the outside of our door.
> Q: Did you hear the door open?
> A: No, sir.
> Q: Are you able to hear the door open from where you sit at your desk?
> A: Yes, sir.
> Q: Do you look up or do you react when you hear the door open?
> A: Every time someone touches that door handle, we are trained to look up.
> Q: Why is that?

A: Because we're going to have to – I was going to have to help that person.
Q: Did you hear the door shut?
A: No, sir.
Q: Did you hear anyone fall?
A: No, sir.

Appellee's expert at trial, whom the trial court specifically found as credible in its Order, was Chad Becker. His testimony at trial, in which he stated his opinion that there was no condition at the Maury County's Trustee's office that caused or contributed to Appellant's fall, was as follows:

> Q: The physical evidence. In this case, Miss Runions' body position after the fall, what significance is that to you?
> A: It's -- based on this particular situation, I feel like it's very significant because it shows that she was outside the door when she fell.
> Q: What is your understanding of what happened when Miss Runions fell?
> A: Well, from what I understand, it was on February 17th, 2004. She came there to pay her taxes. She stated she grabbed the door, she was holding onto the handle when she opened the door and stepped inside. I'm not sure, based on today, if it's -- I'm not sure if she stepped inside the door based on the testimony, but from what I understand from the depositions and everything, she stepped inside the door and claimed the incline caused the fall. If you look at the incline -- I mean, decline. I'm sorry. The slope. To have done that it would be very difficult, in my opinion, for that to happen, if not impossible, because if you're holding the door and you're stepping inside the door it's like it's five-and-a-half inches of where it's level before it slopes down once you pass that threshold.
> . . . .
> A: I don't feel like – I feel like that if she had fallen as a result of the slope, she would have been physically inside the office. She wouldn't have been outside the office.

Regarding the credibility of witnesses, the Supreme Court of Tennessee has stated the following: "We must accord considerable deference to the conclusions of the trial court as to the credibility of live witnesses, since that court has had the opportunity to see and hear those witnesses. *Jones v. The Hartford*, 811 S.W.2d 516, 521 (Tenn. 1991)." *Wyatt v. Ivy Hall Nursing Home*, 2007 Tenn. LEXIS 46, at *5 (Tenn. Jan. 31, 2007). Further, the Supreme Court has stated:

> Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App.

> 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics, Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

Wells v. Tenn. Bd. of Regents, 9 S.W.3d 779, 783 (Tenn.1999).

The trial court judge had every opportunity to observe the witnesses and their demeanor, while this Court did not. Therefore, it is our opinion that the trial court's findings of fact and conclusions of law are supported by the preponderance of the evidence, and certainly Appellant has not carried her burden under Tennessee Rule of Appellate Procedure 13(d) to establish that the evidence preponderates against the trial court judgment.

C. Introduction of Federal Safety Requirements

Appellant argues that the trial court should have considered federal regulations regarding the proper closing speeds of internal doors in public buildings. According to Appellant, the door in the Trustee's office violated federal regulations by closing too quickly and exceeding the pounds of pressure limitations established by the regulations. Appellant maintains that the failure of the door to meet federal guidelines constituted notice to Appellee of a dangerous condition. Appellee argues that the federal regulations issued under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and therefore do not apply to Appellant because Appellant was not within the class of those to be protected by the statute.

Appellant did not allege application of the Americans with Disabilities Act in her Amended Complaint and offered no proof of such applicability. Appellee moved to disallow any evidence under federal regulations applicable by their terms only to action under the Americans with Disabilities Act. When Appellant attempted to interpose such federal regulations during the testimony of the expert witness Harvey L. Hall, the following occurred:

> MR. BEEMER: Your Honor, may I just -- you took the motion to dismiss the defense filed in the ADA under advisement. Mr. Hall is going to testify on the ADA standards. The proof is already in the record that the ramp in question was there. This all predated the Americans with Disabilities Act. If the Court is inclined to grant the defense motion, then any testimony on the ADA is irrelevant
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> MR. DAVIDSON: I don't think it's irrelevant. Even if the ADA doesn't apply to the building in terms of a violation of the Act, federal standards can be used to determine if there is a dangerousness of a condition existing in the building. And the fact that he would not violate the ADA in terms of being covered under the Act itself doesn't mean that the ADA standards can't be introduced to show a dangerous condition.
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> MR. BEEMER: That was part of our motion, Your Honor. If he's using it as a negligence per se, I'd like to see some authority that a violation -- a Tennessee State law is a violation of the ADA is negligence per se. I haven't seen that. And that was one of the parts of our motion. That you can't use the ADA as a negligence per se standard, and that's basically what he's arguing.
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> MR. DAVIDSON: I'm not arguing it's a negligence per se. I'm arguing that negligence per se with the Tennessee Code violation, which is that document entered there. I'm arguing that the ADA simply has federal guidelines that talk about when a place can be dangerous to a handicapped person.
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> And those guidelines, while not being able to be used to show a violation, quote, that's ADA itself, they are in fact guidelines that can show that if you violate, you have a dangerous condition. I mean, the reason those things are put in place is because the federal government has determined that they are minimum standards for people who are handicapped entering access to a building.

Now, it may not be a violation of the law, but it can be shown as evidence that there is a dangerous condition precedent here to this lady falling.

MR. BEEMER: Here's the problem with that argument. If someone who's not disabled under the ADA, would the County still be liable for violating the ADA standard? That's why that argument doesn't work.

The ADA covers discrimination with regard to program accessibility for people entering county buildings. It does not mandate that every county building be in compliance with the ADA for buildings that were constructed or renovated prior to the Act.

I think that's -- that's an argument that I'd love to see some authority for. I don't think that's correct, Your Honor. I think we're wasting our time with the ADA if the ADA does not apply here.

MR DAVIDSON: Well, I'm not -- I disagree, Your Honor, and respectfully disagree. I think you can show a violation of a federal law, especially one that deals with the issue of what could be a dangerous situation, even though it might not legally apply to this county in terms of whether they violated the ADA itself. The law itself can be used to show that there is a standard out there to govern how this -- whether this is a safe or unsafe condition or not.

THE COURT: Do we have any case laws supporting that?

MR. DAVIDSON: Your Honor, I don't have any case law. I'm not sure there's any case law at all. I think it may be a case of first impression. I think -- what we're trying to do here is we're not trying to say at this stage -- because I think I would agree with counsel that at this particular time the evidence is is that the ADA did not apply to this building in terms of a violation. I think I will agree that that's what the evidence has been so far. And I don't see that evidence changing.

But I still say that you can take a standard showing that something is dangerous and you can -- for instance, this building, these warnings here are not -- you know, I think that we can show that they violated certain standards for warnings. But it just goes to the circumstantial evidence, the surrounding evidence that's there that this door was dangerous for people.

I mean, if the federal government says that these doors are dangerous if they don't meet these standards, then that is a standard that Court could consider.

THE COURT: Mr. Davidson, I think you either are or not traveling under ADA.

MR. DAVIDSON: Your Honor, I don't think we're going to be able to travel under the ADA.

THE COURT: So I'm going to grant the motion.

MR. DAVIDSON: So, in other words, we cannot introduce any standards by ADA to show possible negligence? I want to make sure I understand.

THE COURT: That's the Court's ruling.

The ruling of the trial court disallowing all federal regulations issued pursuant to the Americans with Disabilities Act is eminently correct because there is no proof in the record that Appellant is a person intended to be benefitted by the Act.

> In *Alex v. Armstrong*, 215 Tenn. 276, 385 S.W.2d 110 (1964), our Supreme Court stated:
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> > The rules in Tennessee relating to liability for the violation of a statute have been stated as follows:
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> > > "It is well settled that failure to perform a statutory duty is negligence per se, and, if the injury is the proximate result or consequence of the negligent act, there is liability." *Wise & Co. v. Morgan*, 101 Tenn. 273, 278, 48 S.W. 971, 44 L.R.A. 548 [(1898)]. "It has long been well settled in this State that a violation of a statute which causes injury to one within the protection of the statute is negligence per se and actionable." (citing numerous cases) *Null v. Elec. Power Board of Nashville*, 30 Tenn.App. 696, 707, 210 S.W.2d 490, 494 [(1948)].
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> > > "In order to found an action on the violation of a statute, or ordinance, * * * the person suing must be such a person as is within the protection of the law and intended to be benefited thereby * * * We think that one not a beneficiary of a statute may neither base an action nor a defense on a violation thereof." *Carter v. Redmond*, 142 Tenn. 258, 263, 218 S.W.217, 218 [(1920)].
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> *Armstrong*, 385 S.W.2d at 114.

Messer Greiesheim v. Eastman Chemical, 194 S.W.3d 466, 482 (Tenn.Ct.App.2005).

The judgment of the trial court is affirmed and the case remanded for such further proceedings as may be necessary. Costs are assessed to Appellant.

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WILLIAM B. CAIN, JUDGE